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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE JOSEPH C. SPERO, MAGISTRATE JUDGE

IN RE SEAGATE TECHNOLOGY LLC)
LITIGATION.)

No. C 16-0523 JCS
Friday, August 25, 2017

TRANSCRIPT OF PROCEEDINGS

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Official Reporter

Friday - August 25, 2017

9:42 a.m.

P R O C E E D I N G S

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THE CLERK: Calling case number C 16-0523, In re
Seagate Technology LLC Litigation.

Appearances, please.

MR. BERMAN: Good morning, Your Honor.

THE COURT: Good morning. How are you doing?

MS. McLEAN: Good morning, Your Honor.

THE COURT: Good morning.

MS. McLEAN: Anna McLean for the defendant Seagate
Technology.

MR. POPOVIC: Neil Popovic for the defendant.

MS. SUI: Joy Sui, also for the defendant.

MR. BERMAN: Steve Berman for the plaintiffs.

MS. SCARLETT: And Shana Scarlett for the plaintiffs.

THE COURT: Welcome.

So we got your latest -- you know, I've got to say that
I've had an initial reaction, which my law clerk may have to
calm me down from, which was, we're doing a 12(c) motion? We
just did a 12(b) motion on the same complaint.

So I'm going to rule on everything you asked me to rule
on, but let's just take this as a warning for the future. This
is piecemeal litigation. I have no intention of doing
piecemeal litigation.

1 The next significant event is supposed to be class
2 motions. There will be one of those. And if you want to take
3 a shot at opposing, you oppose it then. The plaintiffs will
4 move for class certification, and you get to oppose. So I
5 don't want cross motions or anything like that.

6 And when we get to summary judgment, there's one summary
7 judgment motion. Nobody gets to file two summary judgment
8 motions.

9 Now, that's a rule that's honored in the breach because
10 there may be good reasons to do something differently,
11 especially as we get -- you know, flesh out some of the issues.
12 As we get towards summary judgment, there may be some we want
13 to peel off because there's too much to bite in one thing. It
14 doesn't look like that kind of case to me, but maybe it is.
15 But you have to ask if you want to do more than one.

16 I didn't have very many questions about this. I have a
17 couple of them which I'll ask, which I think are rather minor.

18 We no longer have an Illinois plaintiff, so I assume I can
19 dismiss the Illinois claims.

20 **MS. McLEAN:** Yes, Your Honor.

21 **THE COURT:** Is that right?

22 **MS. SCARLETT:** Yes, that's correct.

23 **THE COURT:** Okay.

24 **MS. McLEAN:** And we would also ask that the Court
25 dismiss the allegations relating to that plaintiff.

1 **THE COURT:** No, I'm not doing that. That's completely
2 unnecessary. And that's one of the reasons I'm going to deny
3 part of your motion to strike is, if a claim is dismissed a
4 claim is dismissed. I'm not striking allegations. You can't
5 dismiss allegations. I'm dismissing his claim and all the
6 Illinois claims.

7 **MS. McLEAN:** Your Honor, if I could just ask a
8 question about that, because there are certain allegations that
9 the plaintiff makes --

10 **THE COURT:** Yeah.

11 **MS. McLEAN:** -- that none of the other plaintiffs
12 make.

13 **THE COURT:** Yeah, well, he's not going to be here, and
14 so he's not a plaintiff anymore.

15 **MS. McLEAN:** But to the extent they're using those to
16 try to make a claim of misrepresentation or omission then --

17 **THE COURT:** So let me ask you that. Do you think they
18 can do that? Do you think that Ms. Scarlett, when she gets
19 there, is going to be able to say to the jury that there was
20 this misrepresentation or omission even though no plaintiff
21 claims it?

22 **MS. McLEAN:** Not as to this particular plaintiff, Your
23 Honor. But my concern is that if those allegations remain in,
24 one, they're prejudicial to Seagate.

25 **THE COURT:** No, they're not prejudicial to Seagate.

1 They were there before. They were there after. People see
2 them. Whether I strike them or not, they are there. They're
3 not prejudicial.

4 **MS. McLEAN:** Well, in this particular case the
5 plaintiff alleged that he was told things by a Seagate
6 representative, in returning his drive, that were untrue.
7 Those are prejudicial allegations.

8 **THE COURT:** Of course. It's a complaint. Complaint
9 allegations are by their nature prejudicial.

10 **MS. McLEAN:** Yeah.

11 **THE COURT:** I've got to tell you, this is what I'm
12 talking about. This is a completely unnecessary argument. And
13 it just is make-work for everyone, and it's going to be denied
14 every time. And don't do it again.

15 **MS. McLEAN:** Yes, Your Honor.

16 **THE COURT:** The motion to strike in federal court is
17 an extremely limited remedy. Extremely limited remedy. It is
18 not designed and there's no authority for the proposition that
19 it's designed to substitute for failure to state a claim or to
20 strike allegations after a claim has been dismissed. That's
21 just not what it's for.

22 My view is this motion should have been just all in your
23 12(b) or put it in summary judgment. But it's a waste of time.
24 It's just a waste of time. It's an extra step you're making
25 everyone go through. You're increasing the fees on both sides,

1 and I don't want it. I don't want it. I want you to focus on
2 the things that matter. Those things don't matter.

3 So I know you disagree with me on this, but it's very
4 important that you know my view on it.

5 **MS. McLEAN:** I understand your view, Your Honor.

6 **THE COURT:** Okay. Now, so the other thing which was
7 raised in reply, which I think I need to have people address,
8 regards the Massachusetts implied warranty claim.

9 And the defendants in reply raise the issue that is buried
10 in the language of the -- I don't know how to pronounce that --
11 *Iannacchino* case. Is that how people are pronouncing --

12 **MS. McLEAN:** I don't know how to pronounce it, but
13 that's the right case.

14 **THE COURT:** It's about the scope of the word "defect"
15 under Massachusetts law, and argue with some persuasive force
16 that the plaintiff can't proceed on a warranty claim in the
17 absence of a showing that the product failed to comply with an
18 actual official government standard.

19 And I wanted to give you an opportunity to respond to that
20 because it did seem to me that's what *Iannacchino* -- I'm never
21 going to get it right --

22 **MS. SCARLETT:** Nor will I.

23 **THE COURT:** -- says.

24 I will spell it for the court reporter later.

25 **MS. SCARLETT:** So *Iannacchino* had a very specific set

1 of facts where the plaintiff had alleged a defect that was
2 related to a safety standard. And the Court held that once the
3 plaintiffs had acknowledged the safety standard was approved by
4 NHTSA, the regulatory agency, that was fatal to their case.

5 *Iannacchino*, however, cited approvingly to *Bay State*
6 *Spray*, which is a case that came out from the Supreme Judicial
7 Court of Massachusetts, the highest court in the land.

8 So it cited that approvingly as a case where you could
9 bring an implied warranty claim for economic loss. Citing it
10 approvingly does not mean overruling it.

11 And if you also look back at *Jacobs vs. Yamaha Motor*
12 *Corp.*, another Supreme Judicial Court of Massachusetts case,
13 that also allowed for a defective motor claim in a motorcycle
14 that does not have any tethering to a safety standard or did
15 not have any personal injury.

16 **THE COURT:** So how do you square that -- I mean, the
17 sort of general references to prior case law are not
18 particularly useful.

19 How do you square that with the language that the Court
20 used, which was very particular and said that where there's no
21 personal injury or property damage, quote, the company must
22 identify a legally required standard that the products were at
23 least implicitly represented as meeting but allegedly did not.

24 That doesn't seem to be dependent upon that it is -- in
25 this case, they happened to be trying to meet a standard. I'm

1 just wondering how you square it with that.

2 **MS. SCARLETT:** So plaintiffs' position is that that
3 case was very specific to the facts. And because the
4 plaintiffs had no theory other than the tethering to the safety
5 standard, that was what was before the Court and that was the
6 ruling of the Court. And it did not overturn what is decades
7 of case law in Massachusetts allowing an economic loss claim
8 for implied warranty.

9 **THE COURT:** Do you want to respond to that?

10 **MS. McLEAN:** Yes, Your Honor.

11 *Iannacchino* is a Massachusetts Supreme Court case. So to
12 the extent the Court referred to prior case law and then
13 articulated a different standard, it's clearly redefining the
14 standard.

15 And the issue is not whether claims for economic loss are
16 permitted under Massachusetts law. It's clear that they are.
17 But in *Iannacchino* the Court articulated the standard for that,
18 which is, it needs to be based on a legally recognized
19 standard.

20 And the Court in the *In re Ford Motor* case applied that,
21 and that was in 2010. And those cases remain good law.

22 **THE COURT:** And there's also a Massachusetts case,
23 District of Massachusetts case, that seemed to follow the same
24 rule.

25 I just find it -- I understand your position. I just

1 don't understand how that position can square with the language
2 of the opinion, which does not seem to make that dependent on
3 that the claim is founded on a particular government standard.

4 I just -- the language I read seems to be pretty specific
5 that -- I mean pretty general, not specific, that in any case
6 where there's no allegation of personal injury or property
7 damage, that a government legally required standard must be
8 identified.

9 But I'll go back and take a look at it again. It seemed
10 to me that the language of the case was inconsistent with your
11 description of what you want the holding to be.

12 That's all the questions I had. Anyone like to comment
13 on -- I've obviously read everything and have a much too
14 lengthy draft going on.

15 Happy to let you go first.

16 **MS. McLEAN:** Yes, Your Honor, we would like to address
17 the other points we made in our motion. I understand Your
18 Honor is inclined not to entertain them, but give me a chance.

19 There are actually three levels to this motion. So to the
20 extent the Court is concerned about piecemeal litigation, the
21 first two levels are not piecemeal litigation. Admittedly, the
22 third level we did find some additional legal issues we want to
23 raise.

24 **THE COURT:** That's the part I'm going to rule on.

25 **MS. McLEAN:** Right, right. But we have two other

1 levels --

2 **THE COURT:** Yeah.

3 **MS. McLEAN:** -- that I think the Court should address
4 now, regardless of whether it feels the duty to address the
5 other legal issues that we've raised for the first time.

6 But -- and I'd appreciate it, Your Honor, if I could
7 approach and provide Your Honor a demonstrative.

8 **THE COURT:** Okay. Demonstrative on a 12(c) motion.

9 **MS. SCARLETT:** Your Honor, just to note, this is the
10 first time plaintiffs are seeing the demonstrative of
11 approximately a hundred pages.

12 **MS. McLEAN:** Well, this is your complaint so --

13 **THE COURT:** Red line of the complaint.

14 **MS. McLEAN:** -- shouldn't be unfamiliar.

15 What I've done here is just shown the areas in which the
16 plaintiffs agree in footnote 21 in their brief that they will
17 amend to delete. So those are the yellow areas.

18 The red areas are the areas where we believe the Court
19 ordered, in its prior order of February 9th, that they cannot
20 proceed on those claims and allegations --

21 **THE COURT:** Correct.

22 **MS. McLEAN:** -- as well.

23 **THE COURT:** And they don't -- they didn't file an
24 amended complaint.

25 **MS. McLEAN:** Right. You know, I understand Your

1 Honor's feelings on that, but I think it is going to cause
2 problems because plaintiffs are taking the position, as you saw
3 in their brief, that they can proceed on broader claims of
4 omissions than the misrepresentation claim the Court gave them
5 permission to proceed on.

6 And it's our view, based on page 25 of the Court's order,
7 that the omissions claims are equally circumscribed to the AFR
8 and RAID issues, as are the misrepresentation claims, and that
9 to the extent the plaintiffs are arguing they have some broad
10 omission claim as to other issues, those have been dismissed.

11 So that's the red in the demonstrative.

12 And then the blue are the additional allegations that we
13 ask be stricken per this motion, which are the new legal
14 issues.

15 So if the Court is going to do nothing else, we would ask
16 that it look at those first two levels and clarify its order to
17 the extent that it is not permitting omissions claims to
18 proceed without a link to the alleged misrepresentations.

19 The Court referred to the Massachusetts case. We believe
20 there are also some additional legal issues that should be
21 addressed at this stage. We have plaintiffs from a number of
22 states that have different requirements, such as privity, for
23 their implied warranty claims.

24 And, indeed, the implied warranty claim is the central
25 claim of their case. They're seeking a nationwide class under

1 Song-Beverly, and they're also seeking statewide classes under
2 these different laws.

3 And we've cited authority in our papers, Your Honor, as to
4 Florida, New York, Tennessee, that the privity requirements of
5 those states cannot be met here.

6 And plaintiffs have attempted to shoehorn their
7 allegations under certain exceptions such as third-party
8 beneficiary and agency and direct dealing. But we believe the
9 law is clear in those states that the allegations here do not
10 permit those exceptions to apply to a claim of implied warranty
11 under the facts here.

12 The issue of authorized retailers is not sufficient to
13 have a third-party beneficiary or an agency. That's their main
14 claim. They tried to get around privity by saying we have
15 authorized retailers.

16 There's several cases that we cited in our papers that --
17 you know, the *Mesa* case in Florida -- that reject such an
18 attempt to plead around privity.

19 All of the New York cases, even ones plaintiffs cite,
20 reject that attempt to plead around privity. And the Tennessee
21 court only allowed an exception where it was a communication
22 from the reseller to the plaintiff rather than a communication
23 from the reseller to the manufacturer, which is what they're
24 alleging here.

25 So we would ask that the Court reach those issues. Those

1 are pure legal issues. The law is clear. And that would help
2 to narrow the complaint for purposes of discovery and for
3 purposes of class certification.

4 **THE COURT:** Well, I'm going to reach the issues. The
5 issue that is contained in those, which you may have meant
6 to -- or maybe you did reference it, is the -- I mean, there
7 are sort of two -- another set of allegations which you want
8 stricken as nationwide class allegations. And that's a
9 close -- I mean, that's a procedural question that we've all
10 wrestled with as to what stage to do it. I generally don't do
11 it at this stage of the case because I feel like I don't know
12 enough to do it.

13 But I'm definitely going to rule on the new legal issues
14 that you raise under 12(c).

15 **MS. McLEAN:** Okay. Well, I appreciate that, Your
16 Honor. And those -- we do believe the law is clear with
17 respect to those privity requirements in those states.

18 And the law is also clear that they failed to meet the
19 Texas requirement of prior notice before filing suit. They
20 admit that.

21 **THE COURT:** Yeah.

22 **MS. McLEAN:** That's an easy one.

23 In terms of --

24 **THE COURT:** What is that? I guess I don't understand
25 that. Notice requirements are usually never permanently fatal.

1 **MS. McLEAN:** This is Texas.

2 **THE COURT:** They are even not permanently fatal in
3 Texas. It's a unique place, I grant you that, but they are not
4 usually permanently fatal.

5 So I dismiss it without prejudice to reassert it once
6 you've given notice. They have already given notice. I don't
7 know why I would jump through that hoop.

8 **MS. McLEAN:** Well, they didn't give notice before
9 adding Mr. Manak to the complaint and adding a Texas claim.
10 I'm unaware of any authority --

11 **THE COURT:** So I dismiss it. But they've now given
12 notice.

13 **MS. McLEAN:** Right. But I don't -- I'm not aware of
14 any case that plaintiffs have cited or that exists in Texas
15 where that's a permissible maneuver.

16 **THE COURT:** So you think once they don't give notice
17 and sue, they are forever barred?

18 **MS. McLEAN:** Right. That's the idea, is that the
19 defendant is supposed to have an opportunity to cure. And the
20 claim is that he gave notice by returning his drive pursuant to
21 the warranty, where obviously the defendant did cure in that
22 case. So there's no claim of notice there.

23 Then the second drive --

24 **THE COURT:** The second drive, yeah.

25 **MS. McLEAN:** -- that he returned he gave no notice

1 for. He just didn't return it.

2 **THE COURT:** Right.

3 **MS. McLEAN:** And so there was no notice in that case.

4 **THE COURT:** It just seems to me an odd result that he
5 doesn't give notice, he files a lawsuit, and the remedy is he's
6 permanently barred from filing a lawsuit. Because if he gives
7 notice the next time, that gives the defendant an opportunity
8 to cure. And why shouldn't he be able to refile after a
9 notice?

10 **MS. McLEAN:** Because the defendant is supposed to be
11 able to make the plaintiff whole so that he doesn't have a
12 problem anymore.

13 **THE COURT:** No, no. I mean, I'm saying -- I'm just
14 trying to figure out practically how this works.

15 So I dismiss the case, Texas claim. They give notice.
16 They have already given notice, but say they haven't. They
17 give notice. The defendant has an opportunity at that point to
18 do it. An opportunity to cure right then. They don't take
19 advantage of it. Then he can sue; right?

20 **MS. McLEAN:** That's my understanding if they reject
21 the offer.

22 **THE COURT:** Well, they don't have to do anything.
23 There's no requirement of rejection. There's just a
24 requirement of notice.

25 **MS. McLEAN:** I'm not sure about that, Your Honor.

1 **THE COURT:** I am. So they give notice. And then so
2 the legally required opportunity is there. They can sue.

3 So why would I jump through that hoop since they've
4 already given notice?

5 **MS. McLEAN:** They gave notice after filing suit.

6 **THE COURT:** Yeah.

7 **MS. McLEAN:** They can find another Texas plaintiff,
8 perhaps, and do that. But I don't think Mr. Manak can file a
9 lawsuit given the way this was -- the order in which this
10 proceeded.

11 **THE COURT:** Okay. I appreciate the argument. I just
12 think it stretches too much.

13 I'm a little bit troubled by your description of the
14 omissions claim because what I said, and I pulled out the case,
15 my order is what I said, and what I meant was that certain
16 subjects were not plausibly alleged as an omission. And I
17 think I was pretty specific about this.

18 They have not plausibly alleged representations regarding
19 the drive's NAS capabilities or the error read rates. And they
20 have not plausibly alleged that you withheld, therefore,
21 relevant information on those subjects. What I did say -- and,
22 therefore, the motions with respect to omissions was granted.

23 But the other categories are sufficient in 285. Look at
24 it. I said were sufficiently tied to the representations
25 regarding -- I did allow the AFR and RAID capabilities. That's

1 not quite saying omissions regarding the specific AFR. There's
2 a series of omissions that I allowed through.

3 Do you disagree with that way of thinking about it?

4 **MS. McLEAN:** No, we don't disagree with it, Your
5 Honor.

6 **THE COURT:** Okay. That's what --

7 **MS. McLEAN:** We specifically look at page 25 of Your
8 Honor's order --

9 **THE COURT:** Right.

10 **MS. McLEAN:** -- where you say, "In light of these
11 holdings, the Court need not determine whether Seagate would
12 have an independent duty to disclose any of the information it
13 issued beyond that duty triggered by its alleged affirmative
14 misrepresentation."

15 So to the extent there's a duty triggered by affirmative
16 misrepresentations of RAID or NAS capability, we don't dispute
17 that the plaintiffs can proceed on those allegations.

18 It's the broader allegations that plaintiffs seem to be
19 arguing in footnote 21 of their brief that they can still
20 proceed on that trouble us. And we would ask the Court to
21 clarify that.

22 **THE COURT:** I think it's clear 285 has a series of
23 omissions; right. And the omissions that I was not going to
24 allow are the ones that I specifically identified: omissions
25 regarding the drive's NAS capabilities and error read rates.

1 So there is -- let me take a look at this. I'll have to
2 look at this.

3 **MS. McLEAN:** The problem is, Your Honor, these --
4 these other allegations in here, under one, the drives are not
5 reliable or dependable, their position is they can still
6 proceed on those allegations on an omissions claim.

7 **THE COURT:** Yeah. I think they probably can.

8 What I took out is the NAS allegations and the error read
9 rate allegations. The other ones I thought were sufficiently
10 tied to the misrepresentation.

11 I suppose it depends where you go with them. It depends
12 where you go with them. As allegations, they seem sufficiently
13 tied to the lack of capabilities and the errors that the
14 plaintiffs encountered. But it may be that it depends on
15 exactly what you're talking about.

16 **MS. SCARLETT:** May I address this just briefly?

17 **THE COURT:** Yeah.

18 **MS. SCARLETT:** So I think the issue the plaintiffs
19 have are, for example, the defendants are asking for paragraph
20 54 to be struck, which refers to the Barracuda drive.

21 But if you look at Exhibit B, which is where the language
22 comes from, this is all found in the same documents. The AFR
23 rates are on, you know, page 2. The Barracuda stuff that's
24 quoted in paragraph 54 is found on the first page.

25 **THE COURT:** Do this again. I was distracted.

1 **MS. SCARLETT:** Sure.

2 You know, I think that Anna was saying the purpose of this
3 motion to strike was narrow for discovery or class
4 certification.

5 And I think that the difficulty that presents for us, the
6 plaintiffs, are many of these statements are all found in the
7 same advertising material and marketing material from the
8 defendants.

9 And so there will be no narrowing in terms of the
10 discovery or class certification when, for example, Exhibit B
11 has the language of the Barracuda drive that they're asking to
12 be struck, which is found in paragraph 54. But it also
13 includes the AFR, the annualized failure rate that the Court
14 upheld, which will not be struck from the complaint.

15 **THE COURT:** Yeah. And that's not my concern.

16 **MS. McLEAN:** That's not our concern either, Your
17 Honor.

18 **THE COURT:** Doesn't sound like it's their concern. It
19 is, what is left of paragraph 285? That's their concern.

20 And my view is that everything is left in 285 except the
21 references to the NAS and the read error rates.

22 Now, what does that mean? Does that mean you could find
23 any model-wide defect or that you could find any lack of
24 reliability? No, it doesn't mean that. But I don't have to
25 deal with that, and I'm not going to deal with that on this

1 record at this stage.

2 What I've said is that those things, those things are
3 still in the case to the extent that the affirmative
4 disclosures trigger a duty to disclose. And so that's a fairly
5 confined subject matter.

6 Now, I don't know enough about what that means -- you guys
7 know much more than I do -- to really know what that means.
8 But it's a -- it's not any possible defect or any possible
9 reliability problem. But we'll get into that. We'll get into
10 that.

11 I'm sure we're going to get into that on class
12 certification and certainly on summary judgment. But I don't
13 think I can define it more particularly than I already have on
14 the motion to dismiss.

15 **MS. McLEAN:** We understand, Your Honor. I think Your
16 Honor's comments will probably help both parties understand how
17 to proceed.

18 **THE COURT:** Okay. And then I'll probably think about
19 it again and come up with some other way of thinking about it.

20 Okay. I'm sorry. I interrupted the flow of your
21 argument.

22 **MS. McLEAN:** So on the latent defect issue, I
23 understand this is a complex issue. But we're now a year and a
24 half into the litigation.

25 Plaintiffs do not plead and chose not to amend their

1 complaint to plead any more evidence of a defect than they
2 already have, which is still based exclusively on the Backblaze
3 website allegations.

4 And we believe the law is as clear as it can be, is
5 plaintiffs have to do more. They have to do more to identify a
6 defect in their pleading. Certainly at this stage they should.

7 And, you know, the *Mexia* court and the courts applying
8 *Mexia* -- we cite a number of them in our brief -- they require
9 that the plaintiffs identify a defect in their pleading.

10 The defect doesn't have to manifest until after the
11 Song-Beverly one-year statutory period, but it has to be there.
12 And they have to allege what it is.

13 So we believe under both Massachusetts and California law,
14 under Song-Beverly, that plaintiffs have not done enough here
15 and that the allegations that they do have, in fact, militate
16 against a finding of a common defect. Such as in our motion in
17 footnote 14, we summarize the plaintiffs' allegations of all
18 the symptoms that they say occurred with their drives. And
19 there's really no common thread running through them.

20 So we believe, based on the current record, the implied
21 warranty allegations are insufficient to survive the one-year
22 statutory period under *Mexia*.

23 **THE COURT:** Let me ask you what you mean by that. Do
24 you mean they have to have identified the cause?

25 **MS. McLEAN:** They have to have at least identified a

1 common mechanism, is my understanding of the case law.

2 **THE COURT:** Common mechanism. I'm not sure what that
3 means in this context.

4 **MS. McLEAN:** Well, one of the cases, *Yagman*, talks
5 about it. And they talked about common symptoms or mechanism.

6 So they don't have to know the exact scientific cause,
7 shall I say, but my understanding of the case law is they have
8 to allege some common mechanism so that the Court and the
9 parties know what the discovery is about. And at this point,
10 they have not done that.

11 So we would ask the Court --

12 **THE COURT:** So if they say something like the read
13 error rates are A, B, and C -- well, that's not where we are
14 going. Where the AFRs or the RAID capabilities don't function,
15 that's not a common mechanism? That's not a common enough
16 symptom?

17 **MS. McLEAN:** If their plaintiffs could allege that.
18 But they haven't. Their plaintiffs allege completely different
19 mechanisms and completely different -- certainly when they've
20 been deposed, obviously this is outside the record, but they
21 have described completely different circumstances under which
22 their drives failed.

23 So if they could do that, that might be sufficient. But
24 based on the current complaint, they have not done that.

25 **THE COURT:** Uhm. This is an issue that will come up

1 again on class certification, I assume.

2 **MS. SCARLETT:** Certainly, Your Honor.

3 **THE COURT:** And will be a problem for you, I assume.

4 **MS. SCARLETT:** Or it will be addressed by an expert at
5 the time, which will then describe the cause and the mechanism.

6 **THE COURT:** Okay. And so it's a matter of what you
7 needed to put in the pleading.

8 **MS. McLEAN:** The other issue we wanted to raise, Your
9 Honor, was the issue under Song-Beverly of the drives having to
10 be purchased at retail in California.

11 We believe that the allegations are clear that Mr. Enders
12 did not or he does not allege that he did. Mr. Enders is the
13 only California plaintiff, and he's seeking through himself to
14 apply the Song-Beverly Act nationwide.

15 So at a minimum we think that the nationwide allegations
16 need to be stricken. But as to his claim in particular, the
17 law is clear that a sale at retail in this state means the time
18 when title passes from the seller to the buyer, and that that
19 is an individual consideration based on the contract terms in
20 which the plaintiff's transaction took place.

21 So to the extent Mr. Enders -- he alleged he bought his
22 drive from Amazon, and he testified he bought his drive from
23 New Egg. But whoever he bought it from, he needs to allege the
24 terms of that transaction and when title passed. And the --

25 **THE COURT:** Why does that -- he says he bought it in

1 California. I appreciate that that's a fairly general
2 allegation. Why does he need to do that as a pleading matter,
3 go beyond that to the details of how he bought it in
4 California?

5 **MS. McLEAN:** Because he didn't buy it in California.

6 **THE COURT:** If title passed because delivery wasn't
7 included, or whatever the standard is, when it was mailed from
8 California, then there may be a (inaudible) in California.

9 **MS. McLEAN:** Well, then he should allege that.

10 **THE COURT:** That's my question. Why does he have to
11 allege that for the pleading?

12 **MS. McLEAN:** Well, because if he doesn't have a claim,
13 then the Song-Beverly claim disappears from the case.

14 **THE COURT:** I understand that. But the question is
15 why it has to be alleged in the pleading. Lots of people don't
16 have claims. We figure that out during summary judgment.

17 The other question is, what are the facts of the case? I
18 mean, does anybody know?

19 **MS. SCARLETT:** He has been deposed. He purchased 16
20 drives during the class period. At least a couple of those
21 drives were from New Egg, which is a California company. This
22 is outside the pleadings, but those are the facts that he
23 testified to.

24 **MS. McLEAN:** And that's not the standard under the
25 case law.

1 **THE COURT:** Right. Just purchasing from a California
2 company is not the issue. It is when title passes.

3 **MS. SCARLETT:** Which he's here in California. It was
4 purchased in California. And title passed in California.

5 **THE COURT:** He is in California?

6 **MS. SCARLETT:** He purchased the drives in California.

7 **THE COURT:** While he was in California?

8 **MS. SCARLETT:** Right.

9 **MS. McLEAN:** That's not the standard, Your Honor.
10 It's where the title of the product that was purchased passed.

11 So if he ordered it from New Egg in California, you have
12 to look at the terms of service with New Egg as to what their
13 shipment terms are.

14 **THE COURT:** What if they're in California and he's in
15 California?

16 **MS. McLEAN:** If he can establish that New Egg's terms
17 of service provide that it's a destination contract -- which is
18 unusual under the Zeos case. They're actually mostly shipment
19 contracts. But if he can plead that he has a destination
20 contract that required Amazon or New Egg to get the drive to
21 him in California, then title passed in California and then he
22 has a claim.

23 If he has a different type of contract, usually a shipment
24 contract that provides no obligation for the shipper to
25 actually get the drive to the person, their obligation is

1 extinguished at the time of shipment. So if it was shipped --

2 **THE COURT:** Title passes at the time of shipment.

3 **MS. McLEAN:** Yes.

4 **THE COURT:** And that means what with respect to a
5 California company shipping to a California person?

6 **MS. McLEAN:** Well, he hasn't alleged that. He has not
7 alleged where he bought the drives from. Or he's testified
8 inconsistently on that and where they were shipped from.
9 Amazon is --

10 **THE COURT:** He has testified that he bought it from
11 New Egg; right?

12 **MS. McLEAN:** Right. He does not testify as to what
13 the terms of that contract were or where the shipment took
14 place.

15 I mean, people have fulfillment centers all over the
16 place. This statute requires title to pass in California. So
17 the fact that a company is headquartered in California -- there
18 are cases on this we cited in our papers -- is not relevant.
19 It's where title passes.

20 So if he can allege that, then more power to him. But we
21 don't think he can.

22 **THE COURT:** Can he?

23 **MS. SCARLETT:** He could allege that.

24 We don't agree with the articulation of the standard nor
25 that that would be required of every plaintiff or class member

1 to articulate all of the terms of sale. And it's certainly not
2 required for a Rule 8 pleading standard where he has in
3 paragraph 17 --

4 **THE COURT:** Skip to the next step.

5 **MS. SCARLETT:** Sure.

6 If amendment is required, we could allege with more
7 specificity where Mr. Enders bought his drive and where title
8 passed.

9 **THE COURT:** Where would that be?

10 **MS. SCARLETT:** California, is our position.

11 **THE COURT:** What do you mean "our position"? What are
12 the facts?

13 **MS. SCARLETT:** So the facts that I know, as I'm here
14 today -- I wasn't at his deposition -- is that he testified he
15 purchased from New Egg, which is a California company, and that
16 he purchased in California, and the drive was shipped to
17 California.

18 **THE COURT:** From where?

19 **MS. SCARLETT:** From the New Egg vendor.

20 **THE COURT:** New Egg from where?

21 **MS. SCARLETT:** I don't know more specifics than that,
22 Your Honor. I apologize. I wasn't at the deposition.

23 **THE COURT:** That might matter.

24 **MS. SCARLETT:** Okay.

25 **THE COURT:** I mean, because if -- and I'm not sure it

1 matters. But it might matter that title passed from the Kansas
2 City fulfillment center.

3 **MS. SCARLETT:** If it would be helpful, we could
4 provide a supplemental statement on this, that provided
5 additional facts to Mr. Enders --

6 **THE COURT:** I'm not inclined to deal with this on a
7 pleading basis because of the way it's been alleged. But it
8 could ultimately turn out to be a problem. And we will set
9 forth whatever the standard is we think is going to apply, but
10 it might ultimately turn out to be a problem depending on what
11 you find out the facts are.

12 Doesn't sound like anyone knows enough about the facts yet
13 even after his deposition necessarily.

14 Okay.

15 **THE WITNESS:**

16 **MS. McLEAN:** Okay. Your Honor, I mean, the only other
17 thing I wanted to raise -- and Your Honor already raised it
18 earlier -- was the whole *Mazza* issue. And I understand your
19 default is not to deal with that on a motion to dismiss or
20 motion for judgment on the pleadings.

21 **THE COURT:** Yeah.

22 **MS. McLEAN:** You know, to the extent Your Honor would
23 entertain that idea, it does seem as though courts are doing
24 that.

25 Certainly we cited cases, from Judge Orrick in the *Frenzel*

1 case and Judge Tigar in the *Todd* case, where they do reach the
2 issue on a motion to dismiss based on the pleadings.

3 And here we have the UCL, the false advertising law, the
4 CLRA, unjust enrichment, and Song-Beverly which plaintiffs are
5 seeking to apply nationwide. So those are five claims in which
6 they are seeking to displace the states' law and then plead in
7 the alternative for those particular states where they have
8 plaintiffs but not for the other states where they don't have
9 plaintiffs.

10 So they're seeking to displace the state's law without
11 having a plaintiff who bought the drives in that particular
12 state and to have California law apply across the country.

13 And, you know, certainly we do not believe that under the
14 governmental interest test the plaintiffs can meet that
15 standard. And we would ask the Court to take a look at it.

16 You know, *Mazza* looked at what the relevant law is in the
17 different states and pointed out the differences between the
18 consumer protection laws of California and those of other
19 states. It looked at the -- I'm not reading my handwriting.
20 But it looked at the California Supreme Court's *McCann* decision
21 in evaluating the conflicting interests of the states in
22 applying their state's laws. And the *McCann* decision holds
23 that generally the state where the transaction took place is
24 the place that has the greatest interest.

25 So we do not believe the facts as alleged establish a

1 basis for displacing the laws of those states merely based on
2 an allegation that California law should apply.

3 **THE COURT:** I mean, I can see the utility of doing it
4 early.

5 Judge Orrick and Judge Tigar are terrific judges. I have
6 nothing but great respect for them, and I've known them both a
7 long time. But they're braver than I am.

8 I don't have the confidence that one can apply in such --
9 in the pleading setting the *Mazza* standard in a way that --
10 with any certainty. It is so fact specific that I would want
11 to do it at the certification stage when people have fully
12 developed the record, rather than cut it off at the pleading
13 stage. Could end up at the same place. Could easily end up at
14 the same place. But I don't know if it will end up at the same
15 place.

16 And I appreciate the argument, and I think it's an
17 argument that will be fought over again. But I'm really
18 uncomfortable doing it at this stage of the case because --
19 because of the way class certification of those issues -- *Mazza*
20 doesn't set a blanket rule that it's never allowed, that sort
21 of thing. It's very fact specific. So I appreciate the
22 argument, but it would be a mistake for me to do it at this
23 stage of the case.

24 Well, thank you. Is there anything else you would like to
25 say?

1 **MS. McLEAN:** No, Your Honor.

2 **MS. SCARLETT:** Is there anything Your Honor would find
3 it helpful for me to address?

4 **THE COURT:** I have no questions, if that's what you
5 mean.

6 **MS. SCARLETT:** If Your Honor is inclined to deny the
7 motion to strike the nationwide allegations, I think I'd only
8 just briefly like to touch on the Song-Beverly, the first
9 argument the defendants have made that we have not pled a
10 defect existed at the time of the sale. And just to address
11 that, we believe the case law is clear that we need only allege
12 a latent defect existed. It doesn't have to be discovered
13 within the one-year period. And that's the *Mexia* case. And it
14 was followed by the Ninth Circuit in *Daniel vs. Ford Motor*.

15 **THE COURT:** I don't think she disagrees with that. I
16 think she disagrees whether you've alleged such a defect.

17 **MS. SCARLETT:** To the second point, whether it's
18 sufficiently alleged in the complaint, it certainly is rife
19 throughout the complaint that we allege a latent defect existed
20 at the time of sale.

21 And to the extent that further specificity is needed by an
22 expert on the cause and mechanism of it, that's something that
23 will be addressed at class certification/summary judgment. But
24 to require an expert report attached to a pleading is
25 inappropriate.

1 **THE COURT:** Okay.

2 **MS. McLEAN:** I think Your Honor knows our position on
3 that.

4 **THE COURT:** Okay. Is there anything else we should
5 talk about while we're here?

6 **MS. SCARLETT:** Not from our perspective, Your Honor.

7 **MS. McLEAN:** Nor from ours, Your Honor.

8 **THE COURT:** All right.

9 **MS. SCARLETT:** Thank you very much.

10 **THE COURT:** See you later. Thank you.

11 **MS. McLEAN:** Thank you.

12 **THE COURT:** Take it under submission.

13 (At 10:24 a.m. the proceedings were adjourned.)

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16 **CERTIFICATE OF REPORTER**

17 I certify that the foregoing is a correct transcript
18 from the record of proceedings in the above-entitled matter.

19

20 DATE: Tuesday, September 12, 2017

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Katherine Powell Sullivan, CSR #5812, RMR, CRR
U.S. Court Reporter